Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78- 78-648

CITY OF SAN ANTONIO, Petitioner,

v.

SAN PEDRO NORTH, LTD., et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

WILLIAM H. ROBISON
501 Milam Building,
San Antonio, Texas 78205

ATTORNEY FOR PETITIONER,
CITY OF SAN ANTONIO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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NO. 78-

****

CITY OF SAN ANTONIO, Petitioner,

v.

SAN PEDRO NORTH, LTD., et al., Respondents.

****

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS,
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

****

The petitioner City of San Antonio respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, at San Antonio, Texas, entered in this proceeding on January 25, 1978.

In addition to the respondent San Pedro North, Ltd., which is the actual party in controversy,

the following persons, who were parties in the proceeding in the court whose judgment is sought to be reviewed and who support the position of the petitioner, are named as respondents under Rule 21(4) of this court: Lila Cockrell, Richard Teniente, Glen Hartman, Ford Nielsen, Bob Billa, Henry Cisneros, Claude Black, Al Rohde, and Phil Pyndus. These additional respondents were members of the San Antonio city council when the lawsuit was filed in state court.

(All references to "the respondent" in this petition will refer only to San Pedro North, Ltd., unless otherwise indicated.)

OPINION BELOW

The opinion of the Texas Court of Civil Appeals is reported in 562 S.W.2d 260. (App. B)

The petitioner's application for discretionary review in the Supreme Court of Texas was refused, "no reversible error," without opinion. (App. E)

JURISDICTION

The judgment and opinion of the Texas Court of Civil Appeals was entered on January 25, 1978 (App. C, App. B), and petitioner's motion for rehearing was denied on March 1, 1978. (App. D)

The petitioner's application for discretionary review in the Supreme Court of Texas, by way of writ of error, was duly filed on March 29, 1978, and denied ("Refused, no reversible error") without opinion on May 31, 1978. (App. E) A timely motion for rehearing was denied on July 19, 1978. (App. E)

This petition for certiorari was filed within 90 days of that date.

This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Review is sought of the judgment of the Texas Court of Civil Appeals, which, because the Texas Supreme Court refused to grant discretionary review, is the judgment reviewable under 28 U.S.C. §1257. [1]

---

1. Sullivan v. Texas, 207 U.S. 416, 28 S.Ct. 215, 217, 52 L.Ed. 274 (1908); American Railway Express Co. v. Levee, 263 U.S. 19, 20-21, 44 S.Ct. 11, 12, 68 L.Ed. 140 (1923); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160, 74 S.Ct. 396, 397-398, 98 L.Ed. 583 (1954); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678, n.1, 88 S.Ct. 1298, 1300, n.1, 20 L.Ed.2d 225 (1968).

QUESTIONS PRESENTED FOR REVIEW

1. Whether state court judgment that municipal zoning ordinance was not subject to referendum, on ground that referendum procedures of city charter were fatally inconsistent with general laws of the state, violated Tenth Amendment reservation of powers to the people?

2. Whether such state court judgment violated the Equal Protection, Due Process, or Privileges or Immunities Clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The constitutional provisions, statutes, and ordinances involved in this case appear in the Appendix, as follows:

Amendments V, X, and XIV, Sec. 1, to the Constitution of the United States: Appendix F

Vernon's Ann.Tex.Const. art. 1, §§2, 29, and art. 11, §5: Appendix G

Vernon's Ann.Civ.St. arts. 1011, 1011a, 1011b, 1011d, 1011e, 1011f, 1165, 1175, and 1176: Appendix H

Charter of the City of San Antonio, Art. 1, Sec. 3, Par. 9, and Art. IV, Secs. 35, 39, 40, 41, and 43: Appendix I

STATEMENT OF THE CASE

The respondent, a real-estate developer, acquired a parcel of land lying outside the city limits of San Antonio in 1961. The land was annexed in 1972 by the city, the petitioner here, and automatically assigned a temporary zoning classification (Temp. R-1) as provided for in an applicable city ordinance. So long as the property retained its temporary zoning status, it could not be developed. In 1975, the respondent applied to the petitioner for permanent zoning. Thereafter, on October 16, 1976, following compliance with the zoning procedures of the San Antonio city charter--which in fact had simply adopted in toto the provisions of Vernon's Ann.Civ.St. arts. 1011 a-j, the state's zoning enabling act--the petitioner rezoned the tract with permanent classifications (R-1 B-2 and Perm. R-1) that permitted commercial development of the property.

The action of the city council ignited a political explosion in San Antonio. The property in question is situated directly over a subterranean geological formation known as an "aquifer recharge zone" which provides the city of San Antonio with its only source of drinking water. Concerned citizens' groups, alarmed over what they viewed as a genuine threat to their community's well-being--the pollution of the underground recharge zone by commercial development on the surface--immediately organized efforts to put the zoning ordinance to a vote of the people. Their vehicle to do this was a provision of the city charter authorizing a

referendum on "any ordinance passed by the council," except for several enumerated types not relevant here. (App. I)

Their efforts were ultimately successful. The necessary procedural steps accomplished, a referendum election was held on January 17, 1977, in which the voters of San Antonio rejected the zoning ordinance by the wide margin of 44,541 to 12, 407.

The respondent thereupon filed suit in the district court of Bexar County (San Antonio), Texas, seeking, inter alia, a declaratory judgment that the referendum was invalid. The trial court upheld the validity of the referendum, and the respondent appealed.

The Texas Court of Civil Appeals, whose judgment is here sought to be reviewed, reversed on the ground that a zoning ordinance was not subject to the referendum provisions of the city charter. (App. B) In essence, the court reasoned that the city charter's referendum provisions were inconsistent with its zoning provisions, which in turn meant that the referendum provisions were inconsistent with a general state law, inasmuch as the charter's zoning provisions were identical to, and indeed were an adoption of, the state's zoning enabling act. (App. I; App. H) Since there is a provision in the state constitution prohibiting any city charter or city ordinance to be inconsistent with a general state law (App. G), the charter's referendum provisions necessarily could not stand up against the zoning provisions.

The key passage in the opinion read:

> To give effect to the election in this case, assuming that the result of the election was not a repeal of the zoning ordinance previously passed by the municipal legislative body, would be to add a procedural step to zoning which is not required by the comprehensive provisions of the Enabling Act. A city can no more add a step to the procedures required by state law than it can omit one. City of San Antonio v. Lanier, 542 S.W.2d 232 (Tex.Civ.App.--San Antonio 1976, writ ref'd n.r.e.).
>
> (App. B)

I. Raising of the Federal Issue Below

The federal question sought to be reviewed was raised in the following manner:

Between the time the suit was filed in the state trial court on January 19, 1976, and the time it went to trial on January 10, 1977, this court handed down City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976), which likewise involved the submission of a zoning ordinance to referendum vote.

From that point forward in the state litigation, including the trial, the Eastlake decision and the theme of reserved powers of the people figured prominently in the legal arguments of the parties. The petitioner urged their applicability to the case at hand, the respondent resisted them.

Despite the proper and timely presentation of the federal issue, however, the Court of Civil Appeals refused to pass expressly on the question of reserved powers, and based its judgment instead on a point of state law. For this reason, and also because the Texas Supreme Court in denying discretionary review did so without written opinion, the petitioner has necessarily included in the Appendix excerpts from several of the briefs filed in the state proceedings to show that the federal issue was in fact duly raised. (App. J)

In Dewey v. Des Moines, 173 U.S. 193, 199, 19 S.Ct. 381, 43 L.Ed. 665 (1899), the court said:

> Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, * * * there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. 2

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2. See, also, State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); Lawrence v. State Tax Commission, 286 U.S. 276, 282, 52 S.Ct. 556, 558, 76 L.Ed. 1102 (1932).

II. The State Ground Was Neither Adequate Nor Independent

The state court invalidated the municipal referendum, which admittedly had been conducted in full compliance with the requirements of the city charter, as being a void attempt to circumvent the state's zoning enabling act, Vernon's Ann.Civ.St. arts. 1011 a-j (App. H), which posits exclusive procedures for the passage of zoning ordinances. What the court discerned as the fatal defect in the San Antonio referendum was, evidently, that the referendum itself constituted an added procedural step to those enumerated in the state enabling act.

The basic flaw in the reasoning of the court, aside from its refusal to consider the federal issue, is its underlying assumption that the mandatory procedures of the state enabling act must apply to a zoning referendum. The court totally failed to note the distinction between, on the one hand, a zoning referendum and, on the other, a zoning repeal, or a zoning amendment, or some other type of zoning change. It is to the last-named examples that the state zoning enabling act was clearly intended to apply.

An ordinance that repeals a zoning classification, or amends it, or otherwise changes it is regulating the use of the property involved, and is doing so in a direct manner. But an ordinance calling a zoning referendum does not purport to zone property or to regulate its use.

> Such a [referendum] statute is neutral, so far as the subject matter of the referendum is concerned, and merely provides a method for staying the effect of legislation, in this case zoning Ordinance No. 55.49-69, until the electorate has had an opportunity to either approve it or reject it.
>
> When * * * the electorate rejects the legislation the effect is, not to zone property or even to change the zoning of property, but merely to prevent the zoning ordinance as adopted by the City Council, from ever becoming effective. The property in question, being unaffected by the ordinance, remains, as far as zoning is concerned, either zoned or, if previously zoned, as in this case, then in the classification of the previous zoning * * *. Southern Alameda Sp. Speak. Org. v. City of Union City, 314 F.Supp. 967, 970 (D.C.Calif.1970), affirmed 424 F.2d 291 (9th Cir.1970).

The precedential weight of the two Texas opinions cited by the Court of Civil Appeals is not compelling. Bolton v. Sparks, 362 S.W.2d 946 (Tex.1962), did not involve a referendum. Hancock v. Rouse, 437 S.W.2d 1 (Tex.Civ.App. 1969, writ ref'd n.r.e.), was a mandamus action to compel a municipality to hold an initiative and a referendum election to propose new zoning as well as to delete a total of four existing zoning ordinances. The opinion discussed at length the need for compliance with the state zoning statutes as they apply to new zoning, or to zoning proposed by the initiative process.

Hancock did not reach, beyond dictum, any supportable decisions as to the referendum portion of the lawsuit.

The petitioner believes, therefore, that the ratio decidendi of the Court of Civil Appeals, wholly apart from any question of federal law, was not broad enough to sustain the judgment on state grounds. At the least, the federal issue of reserved powers was so interwoven with any issue of state law that one of them could not have been considered without the other.

REASONS FOR GRANTING THE WRIT

The decision below raises very important constitutional issues.

Although it is settled as a general principle that the regulation of municipalities is a matter peculiarly within the domain of the state, thereby precluding a city from invoking federal constitutional guarantees against the state, Newark v. New Jersey, 262 U.S. 192, 198, 43 S.Ct. 539, 67 L.Ed. 943 (1913), the rule is subject to exception when the rights of private citizens of the municipality are involved.[3]

---

3. For example, the doctrine of one-man, one-vote based on equal-protection guarantees under the Fourteenth Amendment places limits on state control of local governments. Municipal Corporation Law, Antieau, §2.04.

[footnote 3 continued on next page]

In the instant case, the power of the state of Texas to regulate the affairs of the city of San Antonio is in issue, and the federal constitutional rights of the citizens of the city are directly involved.

The constitutional nexus is the Tenth Amendment, which declares the reservation of power by the people unto themselves, and the instrument of its expression here was the referendum process, which itself has been referred to as a classic demonstration of devotion to democracy. James v. Valtierra, 402 U.S. 131, 137, 91 S.Ct. 1331, 1333, 28 L.Ed.2d 678 (1971). The operative constitutional guarantees are provided by the equal-protection, due-process, and privileges-or-immunities clauses of the Fourteenth Amendment.

The constitutional questions posed by the instant case are serious and deep, and justify a full examination by this court. "[T]here has been scant judicial consideration of the constitutionality of zoning procedures, as contrasted with a large number of judicial opinions on the constitutionality of substantive zoning acts." Comment, "The Initiative and Referendum's Use in Zoning," C. Oren, 64 Calif. L. Rev. 74, 79 (1976).

[footnote 3 continued from previous page]

Similarly, a state may not manipulate municipal boundary lines for the purpose of excluding black citizens from the franchise; this presents a Fifteenth Amendment issue. Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d ___ (1960).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Civil Appeals, Fourth Supreme Judicial of Texas.

Respectfully submitted,

WILLIAM HOLLIS ROBISON
501 Milam Building
San Antonio, Texas 78205

Counsel for Petitioner

October 16, 1978

APPENDIX

APPENDIX A

JUDGMENT OF THE TRIAL COURT,
January 18, 1977.

No. 76-CI-677

SAN PEDRO NORTH, LTD.

VS.

CITY OF SAN ANTONIO, ET AL.

IN THE DISTRICT COURT

45TH JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

JUDGMENT

On the 10th day of January, 1977, came on to be heard the above entitled and numbered cause. The parties waived trial by jury and the Court having considered the pleadings, testimony, evidence, and arguments of counsel, is of the opinion that judgment should be rendered in favor of Defendants.

It is therefore, ORDERED, ADJUDGED and DECREED that Plaintiff take nothing by this suit against Defendants and that costs of suit be taxed against Plaintiff.

To which judgment Plaintiff duly excepted and gave notice of appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District sitting at San Antonio.

SIGNED and ENTERED this 18th day of January, 1977.

/s/ Robert R. Murray

JUDGE,45TH DISTRICT COURT

APPENDIX B

OPINION OF COURT OF CIVIL APPEALS,
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
SAN ANTONIO, January 25, 1978

SAN PEDRO NORTH, LTD., Appellant,

v.

CITY OF SAN ANTONIO, et al., Appellees.

No. 15828

COURT OF CIVIL APPEALS,
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
SAN ANTONIO

January 25, 1978

Rehearing Denied March 1, 1978.

Harvey L. Hardy, San Antonio, for appellant.

William H. Robison, George H. Spencer, Randolph P. Tower, Clemens, Spencer, Welmaker & Finck, San Antonio, for appellees.

CADENA, Chief Justice.

CHIEF JUSTICE CARLOS C. CADENA:

Plaintiff, San Pedro North, Ltd., a limited partnership, filed this suit seeking a declaration that an ordinance, initiated by petition of voters and adopted at an election, repealing an ordinance adopted by the City Council of the City of San Antonio permanently zoning land owned by plaintiff. Defendants are the City of San Antonio and the members of its legislative body.

Plaintiff appeals from a judgment denying it the relief prayed for.

Plaintiff, engaged in the development of land, purchased the land in question in 1961. The land was annexed by the City in 1972, and under applicable ordinances the land immediately became zoned "Temporary R-1, One Family Residence District."

The City Code contemplates that after land has been annexed the City Planning Commission shall, on its own motion and as soon as practicable, assign appropriate "permanent" zoning classification to newly annexed land. The City Planning Commission did not see fit to initiate appropriate zoning proceedings for the land in question.

Plaintiff conveyed portions of the land in question and in 1975 the buyer successfully initiated proceedings to have the land purchased from plaintiff permanently zoned B-2 and B-3.

Subsequently, in the summer of 1975, plaintiff requested that his land be permanently zoned. The Planning Commission recommended that a portion of the land be permanently zoned B-2 and that the remainder be permanently zoned R-1.

On October 16, 1975, City's governing body adopted an ordinance assigning to plaintiff's land the permanent zoning classifications recommended by the City Planning Commission.

After the enactment of the October 16 ordinance, citizens' groups circulated petitions to repeal such ordinance and thus, in effect, to cause plaintiff's land to revert to its original temporary zoning.

On December 11, 1975, City's governing body certified the petitions as sufficient and, after a motion to repeal the October 16 ordinance was defeated, called an election for January 17, 1976, for the purpose of submitting the proposed repealing ordinance to the voters. At the election held on January 17, 1976, the vote was in favor of the repeal of the ordinance of October 16, 1975. The election results were canvassed by City's governing body and the result officially declared on January 19, 1976.

Article IV, § 35 of City's charter provides that the voters shall have the power to approve or reject at the polls "any ordinance passed by the council save one appropriating money, levying taxes, or fixing utility rates, or any ordinance submitted by the council of its own itiative to a vote of the electors." This section provides that "Within forty days after the enactment by the council of any ordinance which is subject to a referendum, a petition signed by qualified electors of a [sic] city equal in number to at least ten per cent of the electors qualified to vote at the last preceding regular election may be filed with the city clerk requesting that any such ordinance be either repealed or submitted to a vote of the electors."

Clearly, the above charter provision contains no language excluding zoning ordinances from its provisions.

Article I, § 3, Para. 9 of the Charter grants the power to the Council to regulate the zoning and use of land expressly adopts the State Zoning Enabling Act (Articles 1011a to 1011j, TEX. REV. CIV. STAT. ANN. (1963)).

Plaintiff contends that a zoning ordinance is not subject to the initiative and referendum provisions of City's charter. We agree.

At all times pertinent to this litigation, the power of Texas cities to zone was governed by the provisions of Articles 1011a - 1011m, TEX. REV. CIV. STAT. ANN. Pertinent provisions require a public hearing, following notice of at least 15 days, before regulations may be adopted or amended. Articles 1011d, 1011e.

Article 1011f requires the appointment of a Planning Commission to recommend the boundaries of the various zoning districts, and provides that the municipal legislative body shall take no action until it has received the final report of the Commission. This statute also requires written notice of all hearings before the Zoning Commission "on proposed changes."

There are no constitutional or statutory provisions relating to initiative and referendum, except for isolated statutory provisions for referendum with respect to certain subjects not here relevant. The Zoning Enabling Act contains no such provisions.

In Hancock v. Rouse, 437 S.W.2d 1, 4 (Tex. Civ.App.--Houston [1st Dist.] 1969, writ ref'd

n.r.e.), the Court said:

> A zoning ordinance enacted by the City Council without the notice and hearing required by statute would be invalid and the power of the people to legislate directly is subject to the same limitations. ... Since notice and hearing are clearly required by the ... general law of the State, as a prerequisite to the enactment of Zoning Ordinances, and since notice and hearing have no place in the process of legislating through initiative and referendum, the power of the people ... to legislate directly does not extend to the subject of zoning.

In Bolton v. Sparks, 362 S.W.2d 946, 950 (Tex. 1962), it was recognized that zoning ordinances and amendments to such ordinances are invalid where the mandatory provisions of the statutes concerning notice and hearing have been ignored, saying that the requirement of notice and hearing are intended for the protection of property owners against arbitrary action and that compliance with the mandatory provisions of the statutes is essential to the exercise of jurisdiction by municipal governing bodies and each act must be performed.

To give effect to the election in this case, assuming that the result of the election was not a repeal of the zoning ordinance previously passed by the municipal legislative body, would be to add a precedural step to zoning which is not required by the comprehensive provisions of the Enabling Act. A city can no more add a step to the procedures required by state law than it can omit one. City of San Antonio v. Lanier,

542 S.W.2d 232 (Tex.Civ.App.--San Antonio 1976, writ ref'd n.r.e.).

Our conclusion finds support in decisions from other jurisdictions. Forman v. Eagle Thrifty Drugs and Markets, 89 Nev. 378, 516 P. 2d 1234 (1973); Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929); cf. Township of Sparta v. Pillane, 125 N.J. Super. 519, 312 A.2d 154 (1973), where the decision that zoning ordinances are not subject to the initiative and referendum process was based on the necessity for continuity and expertise in zoning, rather than on the statutory requirements for notice and hearing. San Diego Building Contractors Ass'n. v. City of San Diego, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), is not in conflict with the conclusion we have reached, since in that case there was not statutory requirement of notice and hearing and the court was merely considering whether the constitutional requirements of due process were in themselves sufficient to invalidate the adoption of zoning ordinances without notice and hearing. The same is true of City of Fort Collins v. Dooney, 178 Colo. 25, 496 P.2d 316 (1972), where the court concluded that the election campaign was sufficient notice and hearing insofar as the requirements of due process are concerned.

The judgment of the trial court is reversed and judgment is here rendered declaring that the election held on January 17, 1976 did not affect the validity of Ordinance No. 45863 adopted by the City Council of the City of San Antonio on October 16, 1975, and that such Ordinance No. 45863, assigning permanent zoning classification to plaintiff's land, is in full force and effect.

(MURRAY, J., did not participate in the disposition of this case.)

APPENDIX C

JUDGMENT OF THE FOURTH COURT OF CIVIL APPEALS
Wednesday, January 25, 1978

No. 15828

SAN PEDRO NORTH, LTD., Appellant

v.

CITY OF SAN ANTONIO et al., Appellees

APPEAL FROM THE 45TH DISTRICT
COURT OF BEXAR COUNTY.

This cause came on to be heard on the transcript of the record, and the same being examined, it is the opinion of the Court that there was error in the judgment of the court below in holding that the election held on January 17, 1976 had the effect of repealing Ordinance 45863. It is therefore considered, adjudged and ordered that said judgment of the trial court is reversed and judgment here rendered declaring that the election held on January 17, 1976 did not affect the validity of Ordinance 45863 adopted by the City Council of the City of San Antonio on October 16, 1975, and that such Ordinance No. 45863, assigning permanent zoning classification to plaintiff's land is in full force and effect.

It is further ordered that appellee, The City of San Antonio and the members of its legislative body pay all costs of appeal of this Court and the trial court in this behalf expended and incurred, and this decision be certified below for observance.

APPENDIX D

NOTICE OF ORDER OVERRULING
MOTION FOR REHEARING
COURT OF CIVIL APPEALS
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

COURT OF CIVIL APPEALS

500 Bexar County Court House

San Antonio, Texas 78205

March 1, 1978

This is to inform you that in the Cause No. 15828, San Pedro North, Ltd, Appellant vs. City of San Antonio et al., Appellees, the Honorable Court of Civil Appeals today rendered judgment overruling Appellees City of San Antonio et al's motion for rehearing heretofore filed in said cause.

MARGARET J. REAVES
Clerk

APPENDIX E

ORDER REFUSING APPLICATION FOR
WRITS OF ERROR, May 31, 1978

And

ORDER OVERRULING MOTIONS
FOR REHEARING, July 19, 1978

IN THE SUPREME COURT OF TEXAS

May 31, 1978

No. B-7514

CITY OF SAN ANTONIO ET AL

VS.

SAN PEDRO NORTH, LTD.

FROM BEXAR COUNTY, FOURTH DISTRICT

Application on behalf of City of San Antonio et al. and application on behalf of Lila Cockrell et al., for writs of error to the Court of Civil Appeals for the Fourth Supreme Judicial District having been duly considered, and the Court having determined that the applications present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicants, City of San Antonio et al., and applicant, Lila Cockrell et al., each pay all costs incurred on their respective application.

July 19, 1978

No. B-7514

CITY OF SAN ANTONIO ET AL

VS.

SAN PEDRO NORTH, LTD.

FROM BEXAR COUNTY, FOURTH DISTRICT

Motion for rehearing of application for writ of error on behalf of Lila Cockrell, together with motion for rehearing on behalf of City of San Antonio having been duly considered, it is ordered that said motions be, and hereby are, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 7th day of September, 1978.

GARSON R. JACKSON, Clerk

By /s/ Judith E. Sullivan
Deputy

APPENDIX F

UNITED STATES CONSTITUTIONAL PROVISIONS

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV., Sec. 1.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

STATE OF TEXAS CONSTITUTIONAL PROVISIONS

Vernon's Ann.Tex.Const. art. 1, § 2

§ 2. Inherent political power; republican form of government

Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

Vernon's Ann.Tex.Const. art. 1, § 29

§ 29. Provisions of Bill of Rights excepted from powers of government; to forever remain inviolate

Sec. 29. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

Vernon's Ann.Tex.Const. art. 11, § 5

§ 5. Cities of 5000 or more population; adoption or amendment of charters; taxes; debt restrictions

Sec. 5. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State * * *.

APPENDIX H

STATE OF TEXAS STATUTORY PROVISIONS

Vernon's Ann.Civ.St. art. 1011

Art. 1011. [817] [464] [418] Powers

The City Council, or other governing body shall have power to pass, publish, amend or repeal all ordinances, rules and police regulations, not contrary to the Constitution of this State, for the good government, peace and order of the City and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by this title in the corporation, the city government or in any department or office thereof; to enforce the observance of all such rules, ordinances and police regulations, and to punish violations thereof. No fine or penalty shall exceed Two Hundred Dollars ($200). Acts 1875, p. 113; G.L. vol. 8, p. 485; Acts 1949, 51st Leg., p. 367, ch. 190, § 1.

Vernon's Ann.Civ.St. art. 1011a

Art. 1011a. Grant of power for zoning

For the purpose of promoting health, safety, morals, and for the protection and preservation of places and areas of historical and cultural importance and significance, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings, and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the

density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose; and, in the case of designated places and areas of historic and cultural importance, to regulate and restrict the construction, alteration, reconstruction, or razing of buildings and other structures. Act. 1927, 40th Leg., p. 424, ch. 283, § 1; Acts 1959, 56th Leg., p. 883, ch. 406, § 1.

Vernon's Ann.Civ.St. art. 1011b

Art. 1011b. Districts

For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this Act;[1] and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts. Acts 1927, 40th Leg., p. 424, ch. 283, § 2.

Vernon's Ann.Civ.St. art. 1011d

Art. 1011d. Method of procedure

The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation,

restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality. Acts 1927, 40th Leg., p. 424, ch. 283, § 4.

Vernon's Ann.Civ.St. art. 1011e

Art. 1011e. Changes

Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a written protest against such change, signed by the owners of 20 per cent or more either of the area of the lots or land included in such proposed change, or of the lots or land immediately adjoining the same and extending 200 feet therefrom, such amendment shall not become effective except by the favorable vote of three-fourths of all members of the legislative body of such municipality. The provisions of the previous section relative to public hearing and official notice shall apply equally to all changes or amendments. Amended by Acts 1971, 62nd Leg., p. 2864, ch. 942, § 1, eff. June 15, 1971.

Vernon's Ann.Civ.St. art. 1011f

Art. 1011f. Zoning commission

In order to avail itself of the powers conferred by this Act,[1] such legislative body shall appoint a commission, to be known as the Zoning Commission, to recommend the boundaries of the

various original districts and appropriate regulations to be enforced therein. Such Commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such Commission; provided, however, that any city or town, by ordinance, may provide for the holding of any public hearing of the legislative body, after published notice required by Section 4 of this Act,[2] jointly with any public hearing required to be held by the Zoning Commission, but such legislative body shall not take action until it has received the final report of such Zoning Commission. Where a City Plan Commission already exists, it may be appointed as the Zoning Commission. Written notice of all public hearings before the Zoning Commission on proposed changes in classification shall be sent to owners of real property lying within two hundred (200) feet of the property on which the change in classification is proposed, such notice to be given, not less than ten (10) days before the date set for hearing, to all such owners who have rendered their said property for city taxes as the ownership appears on the last approved city tax roll. Such notice may be served by depositing the same, properly addressed and postage paid, in the city post office. Where property lying within two hundred (200) feet of the property proposed to be changed is located in territory which was annexed to the city after the final date for making the renditions which are included on the last approved city tax roll, notice to such owners shall be given by publication in the manner provided in Section 4 of this Act. Acts 1927, 40th Leg., p. 424, ch. 283, § 6; Acts 1949, 51st Leg., p. 205, ch. 111, § 1; Acts 1953, 53rd Leg., p. 732, ch. 287, § 1; Acts 1961, 57th Leg., p. 570, ch. 267, § 1.

Vernon's Ann.Civ.St. art. 1165

Art. 1165. May change charter

Cities having more than five thousand inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature. No charter or any ordinances passed under said charter shall contain any provision inconsistent with the Constitution or general laws of this State * * *. Acts 1913, p. 307.

Vernon's Ann.Civ.St. art. 1175

Art. 1175. Enumerated powers

Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

* * *

26. To divide the city in zones or districts, and to regulate the location, size, height, bulk and use of buildings within such zones or districts or otherwise, and make different regulations for different districts and thereafter alter the same. The governing authorities may be authorized by their charter to create a commission or board for the purpose of carrying out the powers of this section, or may provide for the creation of a board of appeals or review for the purpose of hearing and deciding on appeals from and reviewing any order, requirement, decision or determination of the governing authorities in carrying out the

powers and authority herein conferred; provided the authority and power herein conferred shall never be construed to be a limitation of any other power and authority conferred in this chapter.

* * *

Vernon's Ann.Civ.St. art. 1176

Art. 1176. Further powers

The enumeration of powers hereinabove made shall never be construed to preclude, by implication or otherwise, any such city from exercising the powers incident to the enjoyment of local self-government, provided that such powers shall not be inhibited by the State Constitution. Acts 1913, p. 307.

APPENDIX I

CITY OF SAN ANTONIO CHARTER PROVISIONS

Art. I, Sec. 3, Par. 9

Sec. 3. Powers of City.

* * *

Par. 9. Zoning. For the puropse [purpose] of promoting the health, safety, morals or general welfare of the city, the council may by ordinance regulate the location, height, bulk and size of buildings and other structures, the size of yards, courts and other open spaces, and the use of buildings, structures and land for trade, industry, business, residence or other purposes. Such ordinances may provide that the zoning board of appeals may, in appropriate cases and subject to appropriate principles, standards, rules, conditions and safeguards set forth in the ordinance, make special exceptions to the terms of the zoning regulations in harmony with their general purpose and intent. Such ordinances may provide that the zoning board of appeals may authorize variances from the strict application of the regulations in such cases and subject to such limitations as may be set forth in ordinance. All of the powers granted by Title 28, Chapter 4. Articles 1011A to 1011J, both inclusive, of the 1925 Revised Civil Statutes of Texas, as amended, together with all amendments now existing or hereafter enacted, are hereby adopted.

* * *

Art. IV, Sec. 35

Sec. 35. Power of referendum.

The electors shall have power to approve or reject at the polls any ordinance passed by the council save one appropriating money, levying taxes, or fixing public utility rates, or any ordinance submitted by the council of its own initiative to a vote of the electors; provided, however, that the foregoing limitation on ordinances subject to a referendum shall not apply to any ordinances enacted pursuant to the provisions or Article I, Section 3, Paragraph 12 of this Charter. Ordinances submitted to the council by initiative petition and passed by the council shall be subject to the referendum in the same manner as other ordinances. Within forty days after the enactment by the council of any ordinance which is subject to a referendum, a petition signed by qualified electors of the city equal in number to at least ten per cent of the electors qualified to vote at the last preceding regular municipal election may be filed with the city clerk requesting that any such ordinance be either repealed or submitted to a vote of the electors.
* * *.

Art. IV, Sec. 39

Sec. 39. Effect of certification on referendum petition.

When a referendum petition, or amended petition, has been certified as sufficient, the ordinance specified in the petition shall not go into effect, or further action thereunder shall be suspended if it be in effect, until and unless approved by the electors.

Art. IV, Sec. 40

Sec. 40. Consideration by council.

Whenever the council receives a petition from the city clerk, it shall be immediately considered. A proposed initiative ordinance shall be read and provision shall be made for a public hearing. The council shall take final action on the ordinance not later than sixty days after the date on which such ordinance was submitted to the council by the city clerk. A referred ordinance shall be reconsidered and the council shall, within thirty days, vote upon the question, "Shall the ordinance be repealed?"

Art. IV, Sec. 41

Sec. 41. Submission to electors.

If the council shall fail to pass an ordinance proposed by initiative petition, or shall pass it in a form different from that set forth in the petition therefor, or if the council fail to repeal a referred ordinance, the proposed or referred ordinance shall be submitted to the electors at a special or regular municipal election not less than thirty nor more than ninety days from the date the council takes its final vote thereon.

Art. IV, Sec. 43

Sec. 43. Results of election.

If a majority of the electors voting on a proposed initiative ordinance shall vote in favor thereof, it shall thereupon be an ordinance of the

city. A referred ordinance which is not approved by a majority of the electors voting thereon shall thereupon be deemed repealed. If conflicting ordinances are approved by the electors at the same election, the one receiving the greatest number of affirmative votes shall prevail to the extent of such conflict.

APPENDIX J

EXCERPTS FROM STATE-COURT BRIEFS
SHOWING PROPER PRESENTATION OF FEDERAL ISSUE

Appellant's Brief,
Texas Court of Civil Appeals

Filed March 7, 1977

* * *

(p. 18) City will, no doubt, place their main reliance on the case of City of Eastlake, et al. v. Forest City Enterprises, Inc., 49 L.Ed 2d 132, 96 S.Ct. 2358, decided by the U.S. Supreme Court in June, 1976.

This case upheld the constitutionality (under the U.S. Constitution only) of a charter provision which required a mandatory referendum to approve zoning amendments.

Eastlake is distinguishable from our case in many important respects. Most important, however, is the fact that the decision turned primarily (with three judges dissenting) on the fact that the "referendum rezoning decision" was reserved to the people under the Ohio Constitution.

* * *

Brief For Appellee, City of San Antonio,
Texas Court of Civil Appeals

Filed April 1, 1977

* * *

(p. 9) Appellant avers that if the power of referendum exists in the people at all, it does not extend to zoning matters. After this cause was filed, but before the trial was held, the United States Supreme Court rendered a landmark and decision opinion that goes to the heart of the dispute before this Court; City of Eastlake v. Forest City Enterprises * * * .

* * *

(p. 10) The United States Supreme Court further stated in its Eastlake opinion:

> "In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature. Hunter v. Erickson, 393 U.S. 385, 392, 21 L.Ed. 616, 89 S.Ct. 557, 47 Ohio Ops. 2d 100(1969)."

It is submitted that the framers of the Charter of the City of San Antonio did exactly this with the referendum clause in the City Charter. * * *

* * *

(p. 13) The Texas Supreme Court in the case of Taxpayers' Association of Harris County v. City of Houston, 129 Tex. 627, 105 S,W,2d 655, 657, said:

> "The power of initiative and referendum ... is the exercise by the people of a power reserved to them, and not the exercise of a right

granted ..." and that "... in order to protect the people of the City in the exercise of their reserved legislative power, such Charter provision should be liberally construed in favor of the power reserved."

The Texas Supreme Court's expressions of 1937 would be most compatible to the United States Supreme Court's language in the landmark decision, City of Eastlake v. Forest City Enterprises, Inc. * * * We submit that referendum power is a present, viable and democratic right held by the people of Texas.

* * *

(p. 21) Zoning ordinances are not excluded from the referendum process by the City Charter, general laws, the Constitution of Texas or the United States Constitution.

* * *

Brief For Appellees, Lila Cockrell, Et Al.,
Texas Court of Civil Appeals

Filed March 31, 1977

* * *

(p. 17) The Charter of the City of San Antonio clearly and unmistakably reserves to the people the right of referendum in zoning matters, since it expressly applies to "any ordinances," with four stated exceptions that do not include zoning. As (p. 18) correctly determined by the United States Supreme Court's landmark decision in Eastlake v. Forest City Enterprises, Inc.,

this fundamental right of referendum is a veto power and a logical and proper extension of zoning procedures conducted in accordance with State zoning laws as adopted by the City Charter. * * * This is a classic case for the people's right of referendum - a vital and basic right which has been significantly strengthened and affirmed by the recent Eastlake decision of the United States Supreme Court.
* * *

* * *

Appellant's Reply Brief,
Texas Court of Civil Appeals

Filed April 25, 1977

* * *

(p. 16) We met the issue of Eastlake head on in our original brief * * * knowing full well that City would cling to this case for dear life because of the absence of any other authority upon which they could rely. We distinguished this case then and neither City nor Council have refuted that portion of our brief in any way. Without even attempting to meet our arguments in this regard they blindly rely on the generalities of that case * * * without even making a pretense of reconciling the constitutional, statutory, charter and factual differences between that case and our case. * * *

* * *

Supplemental Reply Brief of Appellant,
Texas Court of Civil Appeals

Filed May 17, 1977

* * *

(p. 3) In "Reply Brief of Appellant," * * * we listed six separate ways in which the case of City of Eastlake, et al. v. Forest City Enterprises, Inc. * * * (on which Appellees so heavily rely) is to be distinguished from this case. * * * We think the opinions of the Ohio Supreme Court and of the U.S. Supreme Court in Eastlake make these distinctions very clear. However, because of the almost total reliance of appellees on this case we now think it advisable to completely lay the Eastlake ghost to rest by citing chapter and verse as far as the Ohio constitution, statutes and case law are concerned. * * *

* * *

Motion For Rehearing By Appellee,
City of San Antonio,
Texas Court of Civil Appeals

Filed February 9, 1978

* * *

(p. 5) It is urged that no Texas appellate court has written on the singular question of whether a zoning ordinance is referable to (p. 6) the electors for approval or rejection as was done in the case at hand. The Supreme Court of the United States spoke very clearly to the question in 1976 in City of Eastlake v. Forest

City Enterprises, ___U.S.___, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). There, the court held that the Ohio Supreme Court had erred in holding invalid a city charter amendment permitting voters to decide whether a zoning ordinance could be altered through the referendum process. In its opinion, 96 S.Ct. at 2364, the court quoted from Southern Alameda Spanish Speaking Organization v. City of Union City, California, 424 F.2d 291, 294 (9th Cir. 1970):

> A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters - an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.

While the views of the Texas courts remains unwritten as to the application of the referendum process to zoning, we do find a clear expression that the process generally is a well-recognized right when it is reserved by the citizens in their city charter. * * *

* * *

Motion For Rehearing By Appellees,
Lila Cockrell, Et Al.,
Texas Court of Civil Appeals

Filed February 8, 1978

* * *

(p. 5) Maryland's highest court has recently held in Anne Arundel County v. McDonough, 354 A.2d 788 (1976), that the subject of zoning has not been pre-empted by zoning enabling statutes and, therefore, a zoning ordinance may come within the referendum power. The Maryland court also states a basic principle which is strongly reiterated by the United States Supreme Court in City of Eastlake v. Forest City Enterprises * * * which is that a referendum is a reservation and not a delegation of legislative power. It is this reservation of power which is included in the referendum provision of the City Charter (of San Antonio).

* * *

Application For Writ of Error
By Lila Cockrell, Et Al.,
Supreme Court of Texas

Filed March 30, 1978

* * *

(p. 14) The referendum, according to the United States (p. 15) Supreme Court in City of Eastlake v. Forest City Enterprises * * * "is a means for direct political participation, allowing the people the final decision, amounting to a veto power over enactments of representative bodies." It is this veto power which the voters of San Antonio exercised in the referendum election held January 17, 1976, and it is this right to a veto power which the voters reserved to themselves in Sec. 35 of the City Charter.
* * *

* * *

(p. 16) Unfortunately, up to this time, the Texas Courts of Civil Appeals in the Hancock case and in the instant case have run roughshod over (p. 17) what has been recently described by Chief Justice Burger of the United States Supreme Court in the Eastlake decision, as "a basic instrument of democratic government" - the referendum. Such cavalier disregard of so basic a part of the democratic process is unwarranted.

* * *

Application For Writ of Error
By City of San Antonio,
Supreme Court of Texas

Filed March 29, 1978

* * *

(p. 7) After this cause was filed, but before the matter reached trial, the United States Supreme Court rendered a decisive opinion in construing a zoning referendum clause in a municipal charter, City of Eastlake v. Forest City Enterprises, ___U.S.___, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). * * * The Court upheld the referendum clause, commenting : " * * * The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to give citizens a voice on questions of public policy. James v. Valtierra * * *."

* * *

Motion For Rehearing of Application For Writ of Error by Appellee City of San Antonio, Supreme Court of Texas

Filed June 15, 1978

* * *

(p. 5) * * * The question of whether zoning enactments of a municipality could be reviewed under the referendum provisions of a municipal charter has been laid to rest by the United States Supreme Court in City of Eastlake v. Forrest City Enterprises, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed. 2d (1976). The Eastlake case not only answered the specific questions in the case at hand, it is the most recent expression on the subject having been handed down after this cause was filed but before the trial was held. The Court of Civil Appeals did not refer to Eastlake in its opinion nor did it attempt to distinguish it from the subject case. It is submitted that the Eastlake decision is squarely in point with the case before the Court and has effectively vacated the holding in Hancock v. Rouse, 437 S.W. 2d 1, 4 (Tex. Civ. App. - Houston [1st Dist.] 1969, writ ref'd. n.r.e.). The Eastlake opinion traces the source of the referendum process (96 S.Ct. 2358 at 2361): "The conclusion that Eastlake's procedure violates federal constitutional guarantees rests upon the proposition that a zoning referendum involves (p. 6) a delegation of legislative power. A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions all power derives from the people, who can delegate it to representative instruments which they create." (emphasis added).

* * *

(p. 10) * * * The citizens' right of referendum, as provided in the City Charter of San Antonio, became operative only after the City Council concluded its delegated duties and adopted the zoning change. It was at this point that the people exercised their "veto power over representative bodies," as discussed in the Eastlake case, supra.

* * *

(p. 11) * * * If the Court of Civil Appeals' decision is allowed to stand, with its holding that the legislature of Texas by enacting Articles 1011a through 1011m, Tex. Rev. Civ. Stat. Ann. has by implication denied the reserved right of referendum preserved in the home rule charter of the City of San Antonio, then the citizens of San Antonio as a class have been denied a right and privilege recognized even by the drafters of the United States Constitution as well as the Constitution of Texas. The United States Supreme Court in the Eastlake decision refers to Federalist Papers No. 39 (at p. 137) to support its holding that the right of referendum is a reserved right in the people rather than a delegated power from the government. * * *.

* * *

(p. 12) * * * If allowed to stand the Court of Civil Appeals' decision that the right of referendum as contained in the Charter of the City of San Antonio is denied by implication in Articles 1011a through 1011m (Tex. Rev. Civ. Stat. Ann.), then Petitioner must, on behalf of its citizens, urge that such statutes and the Court's interpretation thereof is violative of such citizens' rights under Amendment Ten of the Constitution of the United States, which states:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." Further, such statutes and interpretation thereof are (p. 13) violative of the rights of the citizens of San Antonio under the Fourteenth Amendment to the Constitution of the United States which states in part: " * * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." Further, such statutes and interpretation thereof are violative of such citizens' rights under the First and Fifth Amendments to the Constitution of the United States insofar as such amendments may apply. * * *.

* * *